

AMERICAN CONSTITUTION SOCIETY

PANEL DISCUSSION ON TENNESSEE V. LANE

and

THE FUTURE OF THE AMERICANS WITH DISABILITIES ACT

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## P R O C E E D I N G S

MS. BROWN: Welcome. Can everybody hear me? I believe this is on. Can you hear?

My name is Lisa Brown. I'm the acting executive director of the American Constitution Society, and we are honored to be co-hosting this panel with the Georgetown chapter of ACS.

I want to say a special thank you to Ron Lee, who is the president of the Georgetown chapter, and Lisa Kutlin, who's the vice president, who are, I think, out in the hall dealing with problems or answering questions.

As some of you know, I have a long history of working on disability issues, so I am particularly pleased that ACS is able to present this panel today.

Not that long ago, when I worked in the White House, and I actually had some power to further disability initiatives--that time I hope will come again--I had--I was honored to have the sage advice of many people in this room on a variety of issues.

So I'm glad to be able to start returning the favor by putting together this terrific panel of lawyers to help all of us understand one of the most important Supreme Court cases this term. Personally, I can't wait to hear their views following oral argument today about their predictions on the outcome of the case.

As you all know, this case is important not just because of the ADA issues it raises, but also because of the broader federalism context in which it arises.

I can think of no one better to guide us through these issues than Bob Herman, who is the senior advocacy attorney at Paralyzed Veterans of American, and also a Georgetown Law grad.

As advocacy attorney, Bob is responsible for reviewing proposed regs, implementing the ADA and the Air Carrier Access Act. He monitors legal developments under the two statutes and advises PVA chapters and others across the nation on issues arising under the statutes.

Bob is also co-chair of the rights task

force of the Consortium for Citizens with Disabilities, and a member of the board of directors of the Disability Rights Council of greater Washington

Before I turn things over to Bob, we do have assisted listening devices if anybody needs them who doesn't have them already. We also have brail and large-print format lists of our speakers if anybody wants those, and they're out on the table as you walk in.

Finally, I hope on your way out you will pick up the most recent copy of our newsletter, which includes excerpts from our national convention panel on the future of the ADA. In fact, a couple of our panelists here were part of that this summer, and there's some terrific excerpts that I think you would be interested in.

Bob, welcome and thanks.

MR. HERMAN: Thank you, Lisa. Can everybody hear me okay? I have a very threadbare voice, so I'll try to speak up as best I can. Good evening and welcome.

Could I see a quick show of hands, how many attended this morning's argument? Great. Great. Boy, it was a hot bench, to say the least.

It's good to be back at Georgetown Law School, my alma mater. When people hear that I'm a Georgetown graduate, they're impressed by that, but I always say, oh yeah, Georgetown, one of the 40 top 10 law schools in the country.

Speaking of law schools, we are about to engage in a dreadful exercise we promised ourselves we wouldn't do once we graduated from law school, the awful post-mortem. But we can't help ourselves, so we'll go ahead and do it anyway.

First, just to review the facts of the case for you, in case you didn't know. At his first court appearance, George Lane crawled up two flights of stairs to get to the courtroom. He was arraigned and ordered to appear at a later date for his hearing.

When Lane returned to the courthouse for that hearing, he notified the court that he would not crawl to the courtroom again, and further

declined to be carried by officers.

The Court then ordered Lane's arrest and he was taken into custody and jailed. In further proceedings, Lane was left on the ground floor while his counsel shuttled up and down the stairs.

Eventually, one misdemeanor count was dismissed and he pleaded guilty to the other. He sued the state for \$100,000 in damages for humiliation and embarrassment. The state responded by contending that under the Eleventh Amendment, it cannot be sued in federal court without its consent.

Beverly Jones is a certified court report in Tennessee. She complains that because of her disability, she has been denied access to courthouses in four counties. She sued in U.S. district court for \$250,000 in damages. The state moved unsuccessfully to dismiss. The U.S. Court of Appeals for the 6th Circuit eventually put everything on hold pending the outcome of this appeal.

As a person with a disability, this case,

and its potential breadth, terrifies me. Title II implicates a whole range of fundamental rights involving the political process, such as access to the courts and voting.

But Title II also covers the whole breadth of state activity, including the issuance of licenses. And it's not so clear that Title II's prohibition of discrimination in these activities will pass muster.

On the other hand, one veteran ADA litigator suggests that "the worst Garrett and Lane can do is to make Title I and II more like title III. You can sue the changed behavior, but not for damages. Not great, but certainly not fatal."

She goes on to say, far worse are Supreme Court [and] lower court decisions, and such eyes-glaze-over topics as standing, mootness, class actions, private rights of action and the catalyst theory of attorney's fees.

So I don't know what to think. One thing I do know is if we can't muster at least five justices to stand up for the proposition that the

State of Tennessee at least had the obligation to move the proceeding to a different courtroom, then we're in far sorrier condition than I ever thought.

But we have a great panel to discuss these issues. Among other things, you'll hear their various takes on the oral arguments, including what they think was revealed by the questions.

First up, to my left. Arlene B. Mayerson has been the directing attorney of the Disability Rights Education and Defense Fund, DREDF, since 1981. As a disability rights movement lawyer and one of the nation's leading experts in disability rights law, she has been a key advisor to both Congress and the disability community on the major disability rights legislation for the past two decades.

Ms. Mayerson testified before several committees of Congress during the ADA deliberations and filed complaints on the ADA regulations for more than 500 disability rights organizations.

Ms. Mayerson has devoted her career exclusively to disability rights practice,

representing clients in a wide array of issues and coordinating amicus briefs on key disability rights cases before the Supreme Court.

Arlene will talk a bit about the strategy behind her DREDF brief, amicus brief, and provide some ADA background and history. Arlene?

MS. MAYERSON: Thank you. Well, as Bob said, I've been doing this, disability rights, for a long time. What I'm going to do to start off this session is give a little background from my perspective, and my perspective is as a movement lawyer.

I started working in this area actually in the late '70s, and it was really the boon of a new movement in civil rights in our country, the disability rights movement, and also just an amazing revolutionary time in the area of the legal status of people with disabilities.

I want to go from there, give you a little background of what happened in between there and where we are today, and maybe some ideas about how we got there.

In the '70s, of course, all of you probably know that the big legislative enactment that really shook the disability community was section 504 of the Rehabilitation Act in 1973. This was very revolutionary because it was the first time in the history of the world that the word "disability" and the word "discrimination" appeared in the same sentence.

It was the symbol for the disability community of really being part of the civil rights community. This 504 was based on Title VI, which bans race discrimination, Title IX, that bans sex discrimination in educational institutions, and it was using the same language and recognizing that like people, racial minorities and women, people with disabilities face discrimination not because of something inherent within them, but because of societal barriers.

From 1973 until 1979, there was a major fight where the disability community had an opportunity to really be a very cohesive movement fighting for regulations that would implement this

new Congressional mandate.

There were a lot of issues between '73 and '79 to make these regulations meaningful for people with disabilities, but none was more important than defining what non-discrimination meant in the context of disability. And while the word "discrimination" was the same as race and sex, there was a lot of thought that went in to how would it actually have meaning for people with disabilities.

One thing that was very clear to the disability rights movement is that simply getting equal treatment would not secure equal protection or non-discrimination. So in 1979, the key victory really of those regulations is that it recognized a different paradigm for non-discrimination or equal protection, which was not just equal treatment but equal opportunity, what needed to be done to make people really have the opportunity to participate in our society.

That paradigm became very much a part of the body of disability law. During the '80s, many,

many statutes were passed, both on the federal level and the state level, which embodied the concepts that had come out of the 504 regulations, and this concept of equal opportunity was key.

In all the various enactments that Congress passed, first starting with 504, culminating in the ADA, there was never any question. And throughout all this legislative history, you will see that these are statutes that were meant to guarantee for people with disabilities the right to equal citizenship, their rights under the Constitution, their rights to equal protection under the law.

So in 1990, when we were working on the ADA, no one blinked an eye really when inserted into the ADA was the statement that the ADA was enacted pursuant to Congress' authority to enforce the Fourteenth Amendment, the Equal Protection Clause.

There were--there were questions on every single solitary sentence of the ADA. There were books written on, you know, how the ADA would

affect bar stools. But there was never one question about Congress' authority to enforce the Equal Protection Clause of the Fourteenth Amendment through the ADA.

So what changed? What brought us from there to here? We have a lot of brilliant panelists today, and they will give you all the very complicated reasons why things change and the change of the law, which I don't have time for in my short talk.

But I would say--well, the change can be summarized in five words, and those five words, of course, are Rehnquist, Scalia, O'Connor, Kennedy and Thomas.

There was a sea change in the law, and what the sea change basically is in a nutshell--and I'm sure, again, people will be talking about it in a much more legal detail--the sea change was that Congress--that the court decided that changing prior law completely once the Rehnquist majority was in place, that in order for Congress to pass a law that authorized money damages against the

state, it must do so according to the Fourteenth Amendment, Equal Protection Clause.

So you go, well that's no problem for disability rights, right? Well, wrong, of course, because the court also said, and we want Congress--you have to use our--our definition of the Equal Protection Clause, our cases on the Equal Protection Clause, what we think it means.

Well, what does the Court think it means in the context of disability rights? It thinks it means basically that the state can do whatever it wants to do as long as it can articulate some kind of rational basis for doing so.

Well again, that kind of leaves things open, because I'm sure to many people in this room, it's really not rational to have a state program that doesn't let all state citizens in the door. But no, that's not what this court means by rational.

And I think the biggest shock, really, of the Garrett case, to me, was how far the Court went, the Garrett case being the predecessor to the

case we're discussing today, *Lane v. Tennessee*, where the Court held that Title I of the ADA was not a valid exercise of the Fourteenth Amendment.

How far the Court went in making clear that its view of non-discrimination, its view of equal protection for people with disabilities, was completely different, diametrically opposed to this view that I was saying had developed in the disability legal arena for the last two decades, in that--in the *Garrett* case, the Court made very, very clear that it thought it was way, way, way beyond the Fourteenth Amendment to ever require any accommodation or modification or removal of barriers.

And the example it gave was, well it might be completely rational for an employer to decide that it doesn't want to hire someone in a wheelchair because it might not want to pay for whatever access modifications need to be made.

That brought us to the next case, which was--in *Garrett*, the Court only decided Title I, and so then here we were with *Lane v. Tennessee* and

a Title II altogether.

The great thing about Lane, of course, was that it had great facts, someone had to crawl up the courtroom steps. Nothing could be more graphic than that. Honestly, in disability, I think one of the things we've been really waiting for is good facts, because we've certainly had a lot of very iffy facts that we've had to deal with before the Supreme Court.

But the case went beyond that. The case went to, is Title II, in all its applications, to local and state government, constitutional? So there was a lot of talk about how to approach the Court. And there was--there was one point of view that the best we could ever hope from this very negative Court after Garrett was for them to uphold Title II as a valid enactment under the Fourteenth Amendment, in the situation where some other constitutional right was implicated, such as, in this case, the right to be present at your own trial, the right to access the courts.

There was another point of view that we

need to make--still make our strongest arguments before the Court that all of Title II and all its application has to be upheld as a valid enactment under the Fourteenth Amendment.

As it turned out, there were two different briefs in the court, and George Lane's brief primarily argued the "as applied approach", and the solicitor general's office mainly argued the Title II as a whole approach.

I think that regardless of the wisdom involved in the choices, and regardless of whether one was right or one was wrong, or whether one was more legally astute than the other, as a movement lawyer, it was a very sad day--sad day in May to have to have, rightly or wrongly--and I'm not saying it was wrong--but to have to pare down the argument to such an extent in order to address the very, very conservative and narrow view that the Court has about the rights of people with disabilities to equal protection under the law.

It was also a very disheartening day to hear some of the things that were said from the

bench. At one point, I think it was Stevens [who] said, well in 1975, Congress made a finding that a million children were totally excluded from school; would that be unconstitutional?

As Tennessee's lawyer was hemming and hawing, well I'd have to know more facts and et cetera, et cetera, Scalia just jumped right in and said well no; just answer no. You know, it could cost money to have those--those kids in school, and if the state has a rational reason--and rational includes we don't want to spend money.

The question came up about voting and someone said something about well, there's--you know, there's--I think that the solicitor general actually said, well this denial of the right to vote, and Rehnquist popped in immediately and said, well what do you mean denial; is there someone standing there saying you can't vote?

Paul Clement says, well some of them can't get in. Well, they popped in. Well, that's very different. Just because they can't get in, Scalia said, they could have brought someone to help them.

So the whole ideas that, you know, you--you believe your own rhetoric. I guess that's the danger, is that I think for me as a movement lawyer, for the disability rights movements as a whole, it's very disheartening to realize that what we held so dear as kind of the heart and soul of the movement and the heart and soul of the legal movement, is really just--just not understood, not agreed to, and there's no consensus. And the highest court of our land is so far from recognizing things that we built a movement on.

I think that for my initial remarks, I'd just like--like to say that, and then hopefully also respond to what other people say as we go along.

MR. HERMAN: Thank you, Arlene. Next up--Ira, are you okay with going next?

MR. BURNIM: Sure.

MR. HERMAN: Ira Burnim is the legal director of the Judge David L. Bazelon Center for Mental Health Law in Washington. He's represented thousands of adults and children with mental

disorders in class action suits around the nation.

He's also been active in Supreme Court cases by spearheading the disability committee--community's efforts in Olmstead and representing the plaintiffs in Garrett. He sits on the boards of the ACLU of Maryland and the advisory board of Mental Disability Rights International.

He was formally the legal director of the Children's Defense Fund and an attorney at the Southern Poverty Law Center in Montgomery, Alabama.

In an e-mail to me, Ira expressed a concern that "a loss in Lane could lead to a loss in the injunctive remedy in areas of fundamental rights. The problem is, if there is no Fourteenth Amendment basis for Title II, will the Court find that there was at least a Commerce Clause basis for Title II in its entirety or in areas of fundamental rights."

Then he asks this question. It will be interesting to see if the issue gets any play at the oral argument. Well, we got our answer, didn't we? Ira?

MR. BURNIM: We did. I've been thinking a lot about the question, and many of us have been talking a lot about the question that was kind of posed by Arlene.

How do you deal with the change in the court? How do you deal with so conservative a court that in many ways rejects the clinical understanding, and even the legal understanding, that was current at the time of the enactment of the ADA?

There were a couple strategies that we identified that did get play both in the briefs and in legal argument. One of those strategies was to bring to the Court's attention what we thought might be a kind of a fact about the next case.

This is sort of a really arcane area of constitutional law. Any time I talk about it, people's eyes kind of glaze over. But the central point here is that what's at stake in Lane could be much more than the right of victims of disability discrimination to pursue a damage remedy or to get damages.

What might happen if we lose the Lane case is that the injunctive remedy might disappear as well, for reasons that I think will probably come out during this argument.

One of the things that we wanted to accomplish in the briefs and in the argument was to make sure that Justice O'Connor and Justice Kennedy, as well, understood this issue, not necessarily--I mean, hopefully vote our way. But we thought that if they understood this issue, that it would motivate them to rule in the favor of Title II and in the favor of the plaintiffs in this case.

Because what--and clearly, I think--we'll see how others--people see this issue. But it seems clearly that O'Connor--Justice O'Connor was clued into this issue.

The first question she asked was about the Commerce Clause. For those of you who understand the arcane of this law, that is really a question about whether if the Court rules against Lane and the plaintiffs here, there will be a remedy for

people who are denied access to the courthouse, whether there will be any remedy, an injunctive remedy in federal court, and/or a remedy in state court under state law.

Justice O'Connor asked very pointedly the lawyer representing the State of Tennessee, whether there was a Tennessee state law remedy. He said no. Thank you.

She got--began to get into the issue of whether there would be an injunctive remedy by getting to the Commerce Clause issue. That wasn't developed much, as I recall, at the interchange, in part because Justice Rehnquist jumped right in--this is sort of my recollection--said, well there's always Ex Parte Young. I mean, he was trying to make the point that there will always be injunctive relief, even if we rule against the state there.

I think it was Justice Ginsburg who pointed out, well if you have an Ex Parte Young case, you still need some statute to enforce, and if Title II is not a proper exercise of Congress' power to enforce the Fourteenth Amendment, then

what's--then we have to sort of look to the next question, is Title II a proper exercise of Congress' power to enforce the Commerce Clause, or its authority to regulate interstate commerce.

To point it sort of simply, and I think honestly, it's not obvious that Title II was applied to the operations of state government itself in those core areas where we are so concerned that Bob identified, voting, access to the political process, access to the judicial process. It's not so clear under this Court's jurisprudence that Congress has the authority to direct the state how to conduct that sort of business under its--under its power to regulate interstate commerce.

What that means essentially, is that if--if we're right that there is--that there may be questions about the Commerce Clause basis of Title II, and these are questions being raised in the courts already by states, that then Title II, if we lose this case, could become a nullity.

One of the things that the states have had

going for them in this--these cases to date is that they can always tell the Court it's just about damages. The statute remains, the substantive obligations underlying the statute remain, injunctive relief remains.

The Court was very explicit about that in Garrett, and in Kimel. Here it seemed that Justice O'Connor was clued in to the fact that Title--that the substantive obligations may not remain, and injunctive relief may not be available.

I think many of us feel that--that she, and maybe other members of this court in the conservative majority, may be reluctant to go that far. And one of the questions that we've kind of asked ourselves and will soon see the answer, is whether it would do more damage to some of the conservative majority's views to uphold the statute under section 5 than it would to uphold it under the Commerce Clause.

I'm not sure how much of that translates to this audience, but the basic question is, what's at stake in this case. And it seemed that Justice

O'Connor understood, as both the U.S. asserted in its brief, and as the private plaintiffs asserted in their briefs, that more was at stake here than simply the damage remedy.

MR. HERMAN: Thanks Ira. Tom, are you okay with going?

MR. GOLDSTEIN: Sure.

MR. HERMAN: Thomas Goldstein is a partner at Goldstein & Howe and was counsel--is counsel to Lane and Jones. Tom is a founder and partner of the Washington, D.C., firm of Goldstein & Howe.

The firm specializes in litigation before the Supreme Court of the United States and almost all of its cases are in that forum. Starting this year, Tom will also teach Supreme Court litigation at Stanford Law School.

Tom argued his ninth Supreme Court case in November and will argue his tenth Supreme Court case in April. His previous arguments involved an array of federal law questions, including the First Amendment, ERISA and civil procedure.

Tom has also taken a central role serving

second chair in a number of leading Supreme Court cases including Bush v. Gore--I heard of that case--New York Times v. Tasini, and Nike v. Kasky. Tom?

MR. GOLDSTEIN: Thanks so much. Yes, we lost, and we're--but we intend to take back a little bit of that ground in this case.

As was just mentioned, my cases are the real eyes-glaze-over cases. Arlene said those are--you know, those are personal jurisdiction, and Ira said the constitutional question. This case is an eyes-glaze-over case to some extent.

My--mine are often ERISA cases, and so this is a joyous break in my everyday practice. I want to talk about three things. There--I want to tell you a little bit about the team of people that was involved in litigating this question, from the trial court on to the Supreme Court.

I want to give you my sense about what I think will happen in this case, both in the short term of what the justices will decide, and what it will mean in the larger picture. Third, I want to give you my sense, and sort of open up a debate

about what in the world the conservative majority is trying to accomplish in this area of the law.

It was an extraordinary pleasure to get involved in this case. The principal parties and our litigation team--I really had a fairly tangential role. Bill Brown, a lawyer in Cleveland, Tennessee, had this case from the very beginning and has devoted an enormous amount of his practice to advocating on behalf of individuals with disabilities getting access to courthouses in Tennessee, spent a lot of time and a lot of money, and really, I think he would freely say, came to this question.

He'd never argued in front of the Supreme Court. He's mostly a trial lawyer and really, I think, developed an extraordinary sense for this area of the law and did--did a commendable job today.

Sam Bagenstos, who's worked with the disability community in a lot of different respects, is a professor at Harvard Law School and was the principal architect of the brief in the

case.

But all of that was done in coordination with a large number of organizations and individuals who have given unbelievable amounts of time and devoted their entire careers to advocating on behalf of the disabled, both in the tactical level, in individual cases, in regulations, and also to shaping the cases that come to the Supreme Court.

This question has been presented to the justices, though the one presented in the Lane case several times before--twice before really--and really an enormous amount of work went on behind the scenes--behind the scenes to make sure the right case got in front of the justices so that when somebody talked about the facts today, Bill Brown was able to talk about George Lane crawling up the steps of the courthouse rather than somebody applying for a medical license, or something like that, to really bring home and personalize the circumstances that are involved in cases under Title II of the ADA.

The people that I met were incredibly impressive and worked through difficult and tense and hard questions about the strategy in these cases, and the movement is really to be commended. If this case is won, it will be--be because of people who have devoted themselves to the subject.

It will show you why it is that litigation actually matters, that the people behind the scenes changed this law for the better. Because if it were not for those people--and I do not include myself and give myself any credit in this--the people who have really worked at this for years and through their careers will have changed the outcome in this case.

That brings me to what my prediction is, and I think that we'll win. I will tell you that I did not think we would win when we went into the courthouse this morning. So that's not just a, you know, oh, we're so cool, although we are.

I think there is a big debate about whether--how we would win or lose the case, and then who would take the blame. But the--in the

event that we win, would we get, as has been discussed, particularly by Arlene, would we win the whole shebang, all of Title II, or would we win Title II in some of its applications?

I now believe that we will win Title II in some of its applications, and then I believe that the line will be drawn at the point of where Title II intersects with fundamental rights. I will explain--there was some question of would it be the court access context, and we'll leave everything else for a later date.

I think that they will draw the line at fundamental rights. And the reason I think that they will do that is they have this stupid rule that says that you only need a rational basis to discriminate against the disabled; however, where fundamental rights are involved under the Supreme Court's constitutional jurisprudence, then a heightened level of constitutional scrutiny is applied.

So I think they will cleave Title II in its applications at that point. I think that has

two long-term consequences, the first is that I think it presents an opportunity for the disability community.

The disability community has been forced onto the defensive by a conservative judiciary, and this is going to be an opportunity--it should be--it creates a difficulty, but hopefully it can be seized as an opportunity to demonstrate through litigation how many times the fundamental rights of those who are disabled are affected by otherwise irrational discrimination, that, you know, the inability to get to polling places, the inability to participate in court proceedings hopefully will continue the education process that I have gone through in the course of this case and others will. I think this is a pain in the butt for litigants and for the government. However, having to go through--and the states are involved in trench warfare in these cases. They will fight every single allegation against them as not involving a fundamental right.

And so it's going to take a renewed

commitment, one that we didn't necessarily think had to be fought through. Title II was enacted, after all. And now there's going to be real, real fights about whether Title II can be applied in any particular case.

The third thing that I wanted to talk about is, what in the world are these cases about? You know, on one level we think--and I think the answer to that question at bottom is that it depends on who the justice involved is. I think that this--these--these sovereign immunity cases mean different things to Justice O'Connor, in particular, than they do to the chief justice and Justice Scalia and Justice Thomas.

I don't believe that this is really about treating states as sovereigns. The Supreme Court, as has been mentioned particularly by Ira, [has] really tried to draw a line and say, you can sue the state and you can make them comply with the law, but you can't take money out of the treasury.

This is not written anywhere in the Constitution, or in the copies I have. But the--but it's

just sort of a thing. The Supreme Court has said, oh, the United States can sue and you can get an Ex Parte Young injunction, and you can enforce things under the spending clause, like there was very little discussion, if any, about the Rehabilitation Act today, where, you know, a state that--a program that gets money, the government can sort of hold the purse strings and say, you'll be amendable to a damage suit.

So it's not seriously about treating them as sovereigns and putting them on the same level as the federal government. What it is about is trying to have some sort of balance, and that is Justice O'Connor's approach to jurisprudence in general, that is, you can go far, but not too far.

I think that will be reflected in this fundamental rights line that I hope that they will draw. Remember, as Ira said, the state said, you have no relief under Tennessee law, but it's this--it's this or nothing.

So I think she's going to say, okay, well it's this then. And I think the reason that

they'll pick the fundamental rights line is the one that Ira pointed out, and that is, look, when it involves fundamental rights, if the statute's going to be sustained, it's going to be because it forces the fundamental rights of the Constitution.

But if it involves other things, not fundamental rights-- like there was talk about the ice skating rink and that sort of thing--that's really what this is all about, ice skating. But in the incidences which it involves things that are not access to courts but are venues, for example, then the statute can be sustained under the Commerce Clause, because there you do have money involved.

And so I think she'll have some sort of patchwork idea that you can keep the statute as a whole. But I think Tennessee did itself a disservice by not establishing the disabled would have some rights absent this provision. And so I think that that worked out well for us.

MR. HERMAN: Thank you, Tom. Tom, are you ready now?

MR. HENDERSON: Sure.

MR. HERMAN: To my right is Thomas Henderson. Tom has served as deputy director and director of litigation at the Lawyers' Committee for Civil Rights under Law in Washington, D.C., since 1990.

In his capacity as deputy director, Mr. Henderson's primary responsibility is for substantive legal and policy work of the organization of leading lawyers from across the country, including litigation, coordinating pro bono litigation by volunteer firms, amicus curiae briefs, legislation, and administrative policy and enforcement issues. Tom?

MR. HENDERSON: Thanks. It's a pleasure to be here, and thanks for the invitation. It's quite a panel that's been put together.

I should say that on behalf of the Lawyers' Committee, we submitted an amicus brief in this case, as we have in the past three or four cases where the Court has considered the question of Congress' power to prohibit discrimination and

to permit individuals to seek to hold states responsible by going to court, federal court in particular.

It has become what we regard as a very important project in our work to try to deal with this phenomenon that began with the City of Boerne case that was decided some years ago, and which was referred to constantly in the argument today.

I'd like to talk about three things quickly. Everybody's correct, these are--you know, describing the Eleventh Amendment to most lawyers is difficult, let alone trying to communicate through--publicly about what's at issue here, particularly given the Court's really tortured interpretation of the Eleventh Amendment, to begin with.

But let me talk about three--three things I think. First--and this has been the subject of our arguments in a line of cases--we simply take the position that the Court was wrong when it established an entirely new and different test for what Congress had the power to do in enforcing the

Fourteenth Amendment.

The text of the amendment itself vests in Congress the ability to legislate, to enforce the guarantees of due process and equal protection. So this is--this is a formidable power that's--that has been given to Congress, into which the Court has deferred in the past.

But in the City of Boerne case, the Court took an entirely different view and would suggest [changing] the relationship seriously, the relationship or the allocation of power both between the Court and Congress, and between the state and the federal governments.

I'll talk about the latter first. Between the state and federal governments, until the Fourteenth Amendment, it was, let's say, unclear at best. But since the passage of the Fourteenth Amendment, it has been very clear that we are citizens of a single national government, that there are constitutional protections that come with that citizenship in a national government, which Congress has the ability to enforce.

The City of Boerne case really turned that all on its head by suggesting that the interests of the state were more important than the power of the federal government and the interest of individuals in seeking to hold the states to their legal obligations, or their constitutional obligations.

In particular, the Court introduced the notion that it would decide what was appropriate legislation under section 5 of the Fourteenth Amendment. It would judge whether Congress was appropriately exercising this--it's already that the Constitution gave it--and took the position that states could not be--would not be accountable to the people, to the individual they have harmed, and would beyond--be beyond the reach of Congress.

So it fundamentally changed or shifted radically the relationship between the federal governments and the states.

The second thing I said, it shifted the relationship between Congress and the Court in the past. As I said, the Court deferred largely to Congress' determination about what was necessary in

exercising its power to enforce the Fourteenth Amendment--that was a matter for Congress to decide; the Court would look at that, but largely deferred--including by a test that said, if there's a rational relationship there between what the Congress has done and some interest protected by the Constitution, that will end our inquiry; we won't look any further.

But it's changed the relationship between the Court and Congress in other ways, as well, because now the Court is saying--and some of the questions that were--that were posed today during the argument, well, what kind of record did Congress have, what kind of evidence did Congress have before it, was this evidence of intentional discrimination, was this evidence of unconstitutional discrimination, or is this just differential treatment?

So the Court has, in fact, treated Congress--it's put Congress in the position as though it were a mere administrative agency, which has to go out and do some factual investigation.

It can only act on the basis of evidence. It's got to make a record of the evidence. The evidence has to demonstrate conduct of a particular type.

You heard Justice Scalia talk about, well is this unconstitutional discrimination or is this just discrimination? And it has to be documented, and it has to be a widespread pattern, that is, it can't just be a state or two. That's not enough.

Evidentially, they said in other cases it has to be a widespread pattern among the states. So they have--they have sharply confined Congress' authority and treated them as though they have to be an administrative agency and make a record, and they can only act on the record.

We'd suggest that not only does it create all of those problems, but it, in fact, fundamentally changes the way legislatures work. Legislatures--legislatures are not administrative agencies. They are not equipped or designed to go out and collect a bunch of facts and make a record the way a court might be or the way an administrative agency might be. That's not the way

legislation gets made. That's not the way Congress as a legislature operates.

So we take the position that this is a serious constitutional program and the Court needs to recede back to its role as a court and give to Congress its role as a legislature.

That's one issue. That's what we see as the major issue involved in all of these cases, this being another one.

A few reflections on today, this court, this case, and what might be the outcome. As I listened to the argument, I was concerned. And as I said, the City of Boerne case kept coming up. That was the case in which Congress passed a statute providing for protection of religious organizations against the states, and it was the case in which the Court first articulated this new standard it has created.

And it concerned me because obviously the exercise of religion is an interest of constitutional magnitude that deserves protection. In a debate that occurred today during the

argument, there was discussion, well can we limit this to just fundamental rights, or those fundamental rights that are protected by the statute, or do we have to view the statute for everything that it might cover?

The answer in *Boerne* would be that they're going to look at the statute as a whole, and say, well, it's over broad, it over reaches, there isn't enough of a record, there isn't widespread unconstitutional conduct, and so forth, and invalidate the whole act.

So the question is, is this--is the Court going to repeat its view in *Boerne*, or is there some reconsideration by some of the justices in the middle, perhaps Justice O'Connor, perhaps Justice Kennedy, to see whether or not they want to do a correction in the course that they created with the *Boerne* case.

I think that's open to serious question. I don't know the answer to that. I'm encouraged that Tom Goldstein thinks that that's what the Court may do. I think that's entirely possible and

it would represent some development of this, we think, very harmful trend of precedent that they may follow.

I think the--the other thing is--the Lawyers' Committee is--we prosecute discrimination cases, largely race discrimination cases. One of the things that I was considering today, as well struck during the argument, is the force of the concern about anti-discrimination as compared to the force of fundamental rights.

Everyone predicted, I think properly in planning this case, that because this case involved access to a courtroom, access to justice, that it had a peculiar force. That certainly does.

I think one of the concerns that we have is--and I think that's a good sign and I think it may--Tom's prediction may be right, that in fact, they're going to say that at least with respect to those matters which touch on fundamental rights, the act is constitutional and those prohibitions exist.

What concerns me, however, is the--again,

that we heard during the argument, the relatively little weight that was given to the notion of anti-discrimination. There are obviously several justices who think that discrimination is not an issue of particular concern. They've defined--they--as Tom said, they've defined a constitutional standard that says, for example, with regard to persons with disabilities, senior citizens and so forth, that its simply rational basis; if there's any reason why they might rationally do it, that's enough.

And they are really at odds, I think, clearly with the rest of society and certainly with Congress as to the harms and the pernicious effects of discrimination. So that is--that is of concern.

I'll wind up by just saying--making a third point is, what can be done about this? I wrote an article in Human Rights Magazine I think about a year ago that talked about this.

There is--you know, we can try to continue to litigate these cases and find room and find exceptions, but the Court set out a pretty clear

path here that is very formidable and needs to be dealt with.

There may be some room for legislating around other constitutional protections, but the Court is interpreting the Constitution here and Congress can't really counter those.

I think that what it comes down to is the persons who are assuming federal judgeships in--Congress needs to exercise its authority to preserve it as an institution from the Court, which is taking power away from it, and the only way it can really do that is by paying very careful attention to who goes on the bench and what those persons will do once they get on the bench.

And I think it falls to those of us who are citizens and voters to make sure that these issues are important to whoever it is that goes to Congress or whoever it is who's going to nominate judges. Because in the end, this is a struggle here of constitutional power and the branches of government need to act to assert their interests to resolve that.

Thanks.

MR. HERMAN: Thank you, Tom. Patty, are you okay? Patricia Millett is the next speaker. She's an assistant to the solicitor general in the Office of the Solicitor General at the Department of Justice.

She served in that position for eight years, during which time, she has argued 16 cases before the Supreme Court and has briefed approximately 40 cases, including the briefs for the government in today's case, Tennessee v. Lane, and in the Garrett case.

Ms. Millett also wrote the government's brief successfully defending the constitutionality of the Family Medical Leave Act's abrogation of sovereign immunity last term in Nevada Department of Human Resources v. Hibbs--she snuck one by them--as well as the government's brief in two other federalism cases, City of Boerne v. Flores and Kimel v. Florida Board of Regents.

Patty gave me a heads up that per Justice Department policy, she will not be able to comment

on the anticipated outcome of the case or otherwise try and read tea leaves. She did say she's happy to discuss the U.S.'s role in defending Title II and their views and arguments, and answer other questions as appropriate.

Well, we'll honor that.

MS. MILLETT: Thank you very much for inviting me. As was said at the opening, this case involves both issues of disability discrimination, but the broader federalism issues for all of us who took federal courts and tried to stay awake--it was a different federal courts class--it was a very different federal courts class when I took it. It was an, oh, don't pay attention to the Tenth or Eleventh Amendment.

Maybe that's why they keep tasking me with briefing these cases. Maybe that was the problem with my brief in the City of Boerne case.

What is the Justice Department doing here? This was a fight between George Lane, Beverly Jones and the State of Tennessee. There wasn't a federal government enforcement action in this case.

But the Justice Department is tasked with defending the constitutionality of acts of Congress, and more broadly, just generally the power of Congress to legislate, which means, I think, in the context of we all know where the current Supreme Court has been on issues of federal congressional power, vis-a-vis the states, so our role has been largely, with the exception of Hibbs, to show up in the Supreme Court about once a term with a kick me again sign on.

We are here both--you know, both as an agency that is in charge--charged with enforcing the Americans with Disabilities Act and with defending the constitutionality of this law. As has been said, I think Tom said and others have said, this issue has been up to the Supreme Court a number of times; someone said two. As a person who has actually been writing these briefs, it was four times.

And the secret reason, I should say, why we don't like the as-applied approach is I will jump off a ledge if I have to brief this again.

Just kidding; we'll do whatever we have to do.

Each time--each time I had one more federalism laws I had to deal with in the brief and more and more demands and limitations imposed by the Supreme Court on what we meant by what--you know, what Congress has to show before it can pass this law, these type of laws.

This time, we actually had to go to two volumes because they want all this evidence of discrimination, which is sort of unusual, especially coming from some justices who I shant name, but normally don't even think legislative history should be relevant to anything.

The good thing--there are a number of good things about this case, one, the people have said the facts of the case, the fundamental rights. Precipitously, we actually--I finally got to write a brief where I had a federalism victory that we could cite, the Hibbs case, which involved gender discrimination.

For those of you--I don't know what level of familiarity there is, but it was a gender

discrimination enforcement statute. And that was--that, I think, gave us some impetus to our focus on fundamental rights, because in the Hibbs case, where they're enforcing gender law and gender discrimination, they didn't demand the two-volume brief from the government of evidence of discrimination because it was an area in which they're already applying heightened scrutiny.

And so I think that's one of the reasons why fundamental rights got so much play here. Would it have had so much play before Hibbs, we don't know because the other cases kept getting dismissed from the Supreme Court. But I think that was--another thing that was probably affected, certainly in the course of briefing, and maybe the course of argument or outcome in this case.

From the government's perspective, when this case came up and we had the Garrett decision on the books--which, you know, your first reaction when you read that opinion, everything's going to be rational basis review, and by the way, we mean rational basis like regulating hot dog sell--sellers, as

opposed to that rational basis with teeth I learned about a long time ago in law school.

Thank you for not saying how many years ago it was we were in law school; leave that part out of the bio. But it was long enough, I know, ago that there was something called rational basis with teeth and rational basis without teeth.

And so you had a Supreme Court opinion saying no, it's just plain old rational basis. If you can come up with a I want to save 50 cents, that will be a rational basis.

We had an opinion that criticized Congress relying on anecdotal evidence. You know, I haven't been to that many congressional hearings, but I don't--you don't normally see people submitting evidence and cross examining. Anecdote--that's what--that's how Congress works. What else are they going to have? It was sort of a stumbling block for us.

Another real problem that had happened with Garrett was they said, by the way, we're not

going to count evidence of discrimination by local governments. That doesn't have anything to do with the states, again, putting aside the fact that states create those local governments.

So you're sort of in a box. So what are we going to do? There were two things we were able--I hope there were a lot of things we did, but two main things, one is, this focus on fundamental rights that we could do after the Hibbs case.

And the second thing was, from the Justice Department's perspective, to flag for the court that a lot more is at issue here. As people have said, versus damages, versus the power of court--Congress to enact this statute.

It sounds dry and federal courts--I hope there's no federal courts professors here; I liked my federal courts class--it sounds kind of dry, but what--what I always had in my mind, and I think this is something--I mean, this is real world consequence. When you put fundamental rights and the power to legislate together, what does that mean?

In many of these other cases, the Kimel case, the Garrett case, they were dealing with laws on employment. So even if you couldn't go get damages, it wasn't section 5--it wasn't civil rights legislation. It was still going to be valid, substantive prohibitions on the states because it's Commerce Clause, it's employment.

That's even under post-Lopez, current Court view of the Commerce Clause. Employment is going to be Commerce Clause power. But this--this--I mean, some of this stuff under Title II--but it's voting that doesn't normally sound in Commerce Clause type legislation. Getting into a courthouse, is that really a Commerce Clause type issue? Getting into the state capital, is that a Commerce Clause issue?

It doesn't sound like, at least, a court that wants to be very restrictive of Congress' power under the Commerce Clause, like it is under section 5 of the Fourteenth Amendment, isn't going--I wouldn't think be too excited to reach out and uphold. That's going to be at least a difficult

row for the government to hoe if we have to defend this statute as Commerce Clause legislation.

Now, you know, we will--we have been defending it as best we can as Commerce Clause legislation and will continue to do so if we need to until we show up in the Supreme Court with another kick me again sign on the Commerce Clause power.

So it's not that we obviously didn't come out in our brief and say it's not Commerce Clause legislation. But we wanted the Court to understand this isn't just about the money damages part. This is about whether--Congress--Congress has to have some power to pass a law. That's our--that's the Constitution I think we all have and that we all agree upon. They have to have some power.

Those are sort of the two I can think of. If anyone else has any other ideas, let me know. But those are the two we have.

If it's not, then what is the image that we--this is where I think they come together. What does the world look like if this is not section 5

legislation and it's not Commerce Clause

legislation?

Well, all of the places of employment will still be accessible to persons with disability, because that's Commerce Clause legislation. So all of your private places of employment and public places of employment--but--and all of the private establishments and businesses--because of Title III of the Americans with Disability Act regulates public--private--private--called public accommodations, but private--private businesses and their operations.

So you'll be able to get into all the private businesses--companies in the world--in this country, and you'll be able to get into maybe some places where people are employed, maybe for the states, and you'll certainly be able to get into all the federal governmental buildings because we're--we're bound by the Americans with--the obligations of the Rehabilitation Act.

So what are the--at the end of the day, if--the image I wanted these justices to take with

them back to conference is, if we rule against the government in Lane in this case, we have said there's a country where it's okay if the only places you can't get into are the voting places, the courthouse, the state capital, to the vessels of democracy.

That's what it's about. That's not--my eyes aren't rolling up in my mind anymore. That's a profound image. And to say that you can't get in and there's nothing that the federal constitution has to say about it, that, I think, is the force of this case.

Whether it works or not, we will see. I'm not going to make a prediction, not only because of our policy, but I'm a big believer in announcer jinx. If you've all been to sporting events, where they say, he hasn't missed a field goal in the last 20 games, boom, he misses that one.

So if I were to say anything, it would probably back fire. But I think that image is the important thing, and I think we got that across. Whether if they care in the end or not, you know,

that's for them to tell us and we have to see.

I think there's been some discussion of the as-applied versus facial defense of Title II. Title II, we all know, covers essentially everything the state and local governments do. And that's a lot. That was one of the problems in City of Boerne with the Religious Freedom Restoration Act. They complained over everything they do.

This is big--you know, big blunder bust legislation for what kind of problem. And so there--there's a very difficult question in this case which hadn't come up in the other cases before this. It didn't come up in Boerne because there was no such thing as a congruence and proportionality test. There was no Boerne when we briefed Boerne, so it didn't come up there.

It was very difficult even for the Justice Department. On the one hand, our job is to defend federal laws, so we have a strong institutional interest in trying to defend as much of a law as we can. And in most areas of legislation, the court will apply--if it's--you know, if it's

constitutional as applied to the facts of this case, that's all you need to do to win, and we won't reach the broader questions.

But in this area, you have this congruence and proportionality test that the Supreme Court has adopted for section 5 legislation, in part because the whole point of section 5 legislation, this is Congress' ability to enforce constitutional rights.

And the Supreme Court has said again and again, even in these cases that we've lost, that means Congress can do more than just enforce--you know, protect against actual violations of the Constitution. It can do more than enact 42 U.S.C. 1983, go bring a lawsuit for a constitutional violation.

It's got this prophylaxis--prophylactic rung. It's just got to be congruent and proportional. And the difficulty with as-applied analysis, from our perspective, it's hard to understand how you focus in on one problem area and then still have anything left of the prophylaxis.

If we have to defend this piece by piece,

then there's no prophylaxis. There was much game playing at the argument about the ice skating rinks, and that doesn't seem like--and to be fair, other litigants tried to argue you have a fundamental right to go ice skating, talking about it in those terms.

But from the government's perspective, if--again, if we step back and look at the image, what are we really talking with reality here?

If the Supreme Court were to agree that there's a problem of states violating the fundamental rights of individuals with disabilities, if they aren't allowing people to cast their votes, to get into the courthouses, to lobby their legislators, to have access to their governmental officials, if we have crossed that line, governments are acting unconstitutionally, there is a need for legislation, then it seems to me, the gloves should come off and we shouldn't keep thinking that while they're doing these terrible things, violating fundamental rights, we're confident they aren't violating rational

basis review over here in the skating rink.

In fact, once the government, a state or local government, there's a problem of them violating fundamental rights, that's precisely what the point of section 5 of the Fourteenth Amendment is.

Once we--once it was discovered and was--the Court's cases evolved to the point of recognizing that fundamental rights were being violated on a basis of race and gender, there's no question then that the remedy is full social integration in public life, and no one runs around going, well, it's okay to discriminate on the basis of race or sex at ice skating rinks.

It seems as if you cross--if--now whether the Court will cross that line is what this case will test, but once they've crossed that line--if they cross that line and say there's a problem with fundamental rights, the as-applied approach, then they should say that we get to bring in all social life and give you access to all of public life as a prophylaxis. That's the remedy.

If states have done this and created sort of a subclass of citizens, the remedy is not integration in just voting and access to the government, it's full social integration, because these things have ripple effects.

One other thing that's difficult about the as-applied--we'll take whatever the Supreme Court gives us--but is, I call it the use it for good versus use it for evil, and that is, if--and you know, this way, maybe the as-applied approach will allow us to get a win from the government, from the Supreme Court, that maybe we wouldn't get without it. Maybe.

But from--those of you who are familiar with the Hibbs case, the Family Medical Leave Act case, this as-applied argument can be used the other way. If you have legislation that seems like section 5 legislation, like in Title VII, gender discrimination, race discrimination, are you then going to be allowed--as was one of the dissent arguments in Hibbs--to go well, yes, there's been discrimination in some parts of employment, but

there's no record of discrimination in family leave policies.

The as-applied argument, there's concern at least on the part of the government that advancement of that argument might be used against us to piecemeal section 5 legislation. So as-again, as an institution that's tasked with defending the scope of congressional power, there's pros and cons. There's double edged swords.

I think of it sort of in a sense of maybe this is--I've talked with some people before--you know, prosecutors will not likely give a jury a middle ground. Either send this guy to jail for a very long time or he has to walk. If you give him a middle ground, they might come back with a softer sentence.

There's some thought in this case. Is it best to give the Court a middle ground or sort of say, this is either a death sentence for Title II, the image of the world where the only places you can't get into are the places that democracy most needs you to have access to, or uphold it as a

whole?

To give them a middle ground, does that make it easier for us? We've taken away that use of the Hobson's Choice, leaving them at Hobson's Choice.

But of course, it's a good thing to take it away if they're going to answer the Hobson's Choice adversely to you. So it may be--may be the appropriate thing to do. But there's some sense in which, you know, we may be allowing--this approach could end up with a new development in the law, which in the end is--it's going to be hard to reconcile with the concept of genuine prophylaxis when there's a real constitutional problem out there.

Thanks.

MR. HERMAN: Thank you, Patty. Paul Wolfson is counsel at Wilmer Cutler & Pickering and represented the American Bar Association in its amicus brief in this case.

From '94 to 2002, he was an attorney at the Office of the Solicitor General, where he

argued 19 cases before the Supreme Court. While at the SG's office, he worked on many ADA cases, including several Eleventh Amendment cases.

Paul?

MR. WOLFSON: Thanks. Let me--most of what I wanted to say has actually been covered, so let's go to the food. Let me say a few words first about why the American Bar Association was in the case, and then sort of make a couple of observations about the argument.

I don't know how many of you have had sort of interactions with the American Bar Association, but the ABA is this huge massive organization that represents plaintiff's trial lawyers, criminal defense lawyers, prosecutors. I mean, it represents the entire--you know, the entire range, and it is a very bureaucratic organization.

I like to joke with Patty that it makes the Department of Justice seem like a live jaguar that can jump rapidly. Everything that the ABA--every policy statement that the ABA adopts, it has to-- it's all like super majority rules and et

cetera.

But one thing that you can say is when the ABA adopts a policy or speaks, it really means it. And when it says something, it really is reflecting what I think is presented as a kind of a consensus view of what kind of right-thinking people in our society really feel.

And that is part of the--sort of the benefit of kind of the ABA's very sort of very, I think, establishmentarian approach. The ABA files very few amicus briefs in the Supreme Court, and it chooses its--you know, it chooses its battles on this very carefully.

There was no doubt, I think, that the ABA was going to file a brief in this case. The ABA has--it supported the adoption of the ADA. It has passed resolutions calling on state and local courthouses to make themselves more accessible.

I think to the American Bar Association, it was just inconceivable that we could have a situation where--where courthouses could be closed to people--to people in any group, including people

with disabilities, and that the symbolic value of pointing out to the Supreme Court that it was absolutely essential that--that a courthouse be open--be open to people in any group, could not be closed to anybody, was absolutely fundamental to sort of how we think of ourselves as a society.

The good news is, I actually--and this was not to be taken for granted, and maybe it's a little depressing to say that this is good news--the good news is, I actually hear, I think from today, a clear majority of the Supreme Court saying it's unconstitutional to deny access to courthouses to people with disabilities, which, you know, when you think about it, gosh, hard one there.

But, you know, that--I mean, there was sort of a little quarreling by Scalia and Rehnquist, oh what do you mean deny? But kind of when--you know, when you sort of really kind of came up to the question of would it violate the Constitution or a state basically to say, no, sorry, we're just not going to make any provision for you to come here, even, you know--and even if

you ask, we're just going to ignore you, they really--you know, there seems, I think, acceptance of the proposition that that does violate the Constitution of the United States, I think, presumably the Due Process Clause.

So that--I came out of the, sort of, the argument quite happy about that point, and I think following on from that point, taking the possibility that, as Tom was saying, that maybe the Court would sort of say, well, since this is--you know, this is at least arguably a violation of the Constitution, or probably a violation of the Constitution, Congress can pass laws in sort of these arenas.

The bad news is that the courts--to me in any rate, the courts, as Tom Henderson was talking, saying earlier, strange inversion of the Fourteenth Amendment, as I see it, just kind of, you know, continues a pace. The combination of the Court's solicitude for the dignity of the state and the Court's kind of contempt for what Congress does in its legislative function, sees no--you know, sees--as I can

tell, sees no sign of abating.

I mean, the dignity of the state is one concept that I've never really gotten my mind around. I mean, the states--states are going to create it, as far as I'm concerned, by the people of the United States for their convenient--you know, convenient operations of government, as Thomas Jefferson said, and the dignity of Delaware has never really impressed me that much.

But, you know, I guess I'm just--you know that's--

MS. MILLETT: Not with the program.

MR. WOLFSON: I'm not with the program, exactly. But beyond that, you know, let me--the kind of--what the Court is saying to Congress in terms of applying civil rights laws to states, it reminds me of sort of the old game of mother may I, which is--Congress has to say to the Court, can I go one step forward, mother may I, and then the Court is sort of--the Court will say yes, you may.

This is--this is very strange because the kind of step back. When *Brown v. Board of*

Education was decided, Justice Jackson agonized--agonized because he said, I look at the Constitution of the United States and it says to me, Congress has power to enforce the Equal Protection Clause, and they know a lot better about how to deal with this, you know, than I do as a judge. I mean, I'm just not--you know, I'm not--that's not what a judge is supposed to do.

Whereas, he eventually kind of, you know, reconciled that position to the necessity of Brown. It was--it shows how far we've gone--how far we've gone.

Then when Title VII of the Civil Rights Act was passed in 1964, and then in 1972, it was applied to the states. And of course, it covers--covered from its enactment both race and sex discrimination in employment.

Well, in 1972, the Supreme Court had not held that sex discrimination by public entities was subject to any form of heightened scrutiny. The Congress was advancing it because Congress was kind of taking, you know, the societal temperature and

saying, now--you know, now is the time to go forward.

There was no reason--nobody even imagined that the states should be shown greater solicitude than private individuals. If anything, when Title VII was enacted, there was all this kind of agonizing about what are we going to do about the person who owns the small little restaurant and he doesn't want to have to work with people he doesn't like, and you know, we have to kind of be solicitous of individuals.

Nobody--nobody paid any attention to this when it came to the states. I mean, there were other--you know, other concerns, but--and it's--we had this bizarre situation where Congress can basically do anything it wants to individuals now, I mean, based on--it doesn't even need anecdotal evidence; it just sort of, you know, just imagine something and pass the Commerce Clause legislation.

But not to apply it to the states because of the dignity of Delaware, you know, Congress has to, I don't know, compile a sort of multi-volume

compendium of--that Patty so ably reproduced in her brief.

It's so strange because, you know, how do we know in this room what the next group is going to be that ought to be extended civil rights protection? We're not--we're not--we don't have the total knowledge of who ought to have civil rights protection in this room.

Years and years ago, the notion that gay men and lesbians should have civil protection would have been hooted down with laughter. Today, there's no law in Congress that extends it, but if Congress wanted to extend that to the states, you better believe they better send out federal marshals to every state to take evidence, because otherwise, that's not going to pass.

The Supreme Court is strangely kind of impeding advances and Congress' ability to take social temperature, which is, I think, very odd. I don't think that the Court believes that it is doing that. But this is kind of the strange corner that they've painted themselves into.

I don't think the story is over yet, but I think that's where we are now.

MR. HERMAN: I want to thank the panel for giving--articulating the humiliation I felt this morning knowing that my fundamental rights to have access to the courthouse could take second fiddle to the dignity of the state.

There's about 10 more minutes left. Do we have time to take some questions?

We have a mic floating around the room, a hand-held mic. If you could use that, raise your hand and use that mic so that C-Span can pick up the sound.

Are there any questions? We got one right here, this gentleman on the aisle.

MR. DAVID KRINSKY: Yeah, I was just wondering, several of you have sort of indicated that the question of congressional authority under the Fourteenth Amendment, section 5, is sort of this yes/no binary issue.

I was wondering if there was any possible-- possibility that we could lose on the Eleventh

Amendment remedy and still uphold the core of ADA section 2, sort of on the notion that Congress might have the power under section 5 to provide injunctive relief under *Ex Parte Young*, but that it would not be congruent and proportional under *City of Boerne* to provide a damages remedy.

Or is it really just a yes/no issue and sort of, if Lane loses, ADA section 2 is a nullity?

MR. HENDERSON: Well, I think--I mean, what you suggest, I suppose, is conceivable, although they--because the congruence and proportionality test dropped out of the sky one day in *Boerne*--when you said there was no *Boerne* before *Boerne*--there was no trace of this test anywhere; it was created out of whole cloth there.

For that reason, I suppose, they can create whatever further reiterations of the test they wish, which might include saying that something is--one remedy is not congruent and proportional and another is.

That's typically not how they've decided it. If it's appropriate legislation under section

5, it is--it then gives them the authority to abrogate the Eleventh Amendment and that follows. But there's nothing to prevent that sort of creative undertaking, I suppose.

MS. MAYERSON: One argument that was made to the Court today that was actually in a brief by former attorney general Thornburg, is to suggesting to the Court that the damage remedy itself could be limited to cases of intentional discrimination that would be proportionate and congruent with the Fourteenth Amendment. And that might be a way out, being able to maintain Title II, but just have a more limited damage remedy.

MS. MILLETT: If I could add, I think in the Garrett opinion, there--there's a distinction between reliance on local governmental--you can't rely on local governmental evidence of discrimination and charge that to the states.

The reason the opinion gave was because local governments aren't protected by the Eleventh Amendment. They aren't immune from damages the way states are. It would be one possible reading of

that language to say that--you know, in deciding this section 5 question, for purposes of the appropriateness of a damages inquiry, we can't look at the evidence of unconstitutional conduct by local governments, and we don't find enough here to find--to justify damages remedy against the states.

In particular, there was a question today about there is no damages remedy under Title III, the private--private business and their provision of access to their businesses and operations.

It wasn't needed there. It wouldn't be needed here and the evidence--we have to look at less evidence for purposes of that, but when it comes to the substantive power to legislate, vis-a-vis local governments, as well as states, it's a bigger picture. And so the substantive power--the ground--it's possible to read Garrett that way. It's--there's obviously some sort of artificial walls that are being set up there in the process.

But it's not--it's not that it would be inconceivable, and of course, the Supreme Court, they'll tell us what they meant by Boerne and all

of these other cases. They really didn't have the questions squarely posed in any of the prior cases because you didn't have--they could just limit their holding to the damages. You didn't have this question.

The only other place where it would have arisen was Boerne, which was a full strike down of the power to enact. And as I said, no one addressed it there because there was no such test yet.

MR. HERMAN: Gentleman over there.

MALE SPEAKER: I want to ask the panel what they thought about what I thought was maybe a curious omission by the government--because I don't want to put Patricia on the spot, maybe I'll leave her out of that question--that was when Justice Kennedy asked Paul Clement, well what kind of constitutional violations might there be in excluding people from places like hockey arenas?

It's funny, but when I read the First Amendment, it seems to me it says something about the right peacefully to assemble. And so he hadn't

thought about that question.

And so my question for the panel I guess is, what do you think the Supreme Court takes from that? Is that a signal to them by the solicitor general's office that the government's not interested in defending?

MR. GOLDSTEIN: Yeah--I'm sorry. I would answer that question both with respect to the narrow sort of course of events here and then the larger course of events.

I think there are two things going on in Paul Clement's answer to that question, probably. The first is, is that if you answer that question in any sort of favorable way, you're going to invite an enormous attack from the right that's going to distract the argument.

The notion that this would be an assembly right in the course of a hockey game, is, you know, for those who really strongly believe in the First Amendment--and there are many--it may be palatable. But it's really going to become a point of contention, and probably Paul regarded it as more--biting

off more than he could or should chew.

I think the other thing that a government lawyer, not having been one, probably faces in answering a question like that is that you are in--you know, the government generally is defending against constitutional claims, and therefore, doesn't--whether Democratic or Republican--doesn't have an incentive to say, you know, everything that we might do is unconstitutional.

I would say from the broader perspective that this line of cases and litigation has been very interesting to me because as much as--you know, as a Democrat and someone who might say, look, I don't--Ted Olson for all I know, believes in this City of Boerne line of cases, but the solicitor general's office and the Department of Justice have fought, so far as I can tell, you know, just as hard all the way up the chain of command.

Paul Clement is sort of the--is the principal political deputy of the solicitor general's office and I for one--and I think this is

pretty true across the range of people who have been involved in the litigation--have been very impressed with the Department of Justice's commitment to these cases, that there hasn't--they haven't blinked at all in the change of administration.

So I don't think the Court read anything negative into it.

MS. MILLETT: If I could just briefly speak in defense of Paul Clement. I think the question had come down to, I think Justice Kennedy's words, is there a freedom to move? And that was the point at which Paul Clement expressed some hesitation.

And one remembers, oh it's easier to think of the answer at home on Jeopardy than when you're standing up there. And it certainly isn't that we haven't fought. Like I said, we've briefed this four times. We fought a lot about this.

I think it was more--it was more a question of understanding sort of what the parameters of Justice Kennedy's question was, because it was preceded by a dialogue about there's

fundamental rights, there's still rational basis. These things all have constitutional predicates.

So I think it was more coming to grips with implications of the federal government acknowledging on the record that there is a freedom to move that would be, you know, a little bit--just sort of wonder where that would be going.

But I can assure you, it is not--it was not a secret code. It is not that we don't believe that people have the right to assemble.

I mean, we've got the litany in here of the rights that you have, and I think we are the ones defending Title II as a whole. It's just we thought the better approach is to argue at some level the ice rink, maybe bring that in as prophylaxis rather than a fundamental constitutional right, and I think that's a fair way for the government to have done it.

MS. MAYERSON: I want to say about that question, I think when it was further clarified--I think it was by Stevens, and he said, well what if an architect came to the state and said it will

cost you exactly the same amount of money; you can either make it accessible or inaccessible? The only reason I'm not going to make it that the state doesn't want to make it accessible, they don't like disabled people, or clarified, do the ushers think it's a pain to have them come?

And actually, that was the last question, I believe, that the State of Tennessee got, and they said was that constitutional or not? And because of what had come before it and everyone saying, well of course, these things aren't constitutional, he answered pretty quickly that no, that would not be unconstitutional.

And I think that was a good way to end the argument from our point of view, because it really showed, following up on O'Connor's concern, what would the world look like. I thought that was a very good what would the world look like ending to the argument for him to say, well that wouldn't be unconstitutional, and do the states need some prompting to include people with disabilities.

Also, I wanted to also add about--it was

very lucky in this record that Tennessee in fact did not have a law that would cover the situation and that the AG from Tennessee could answer so rapidly, no it wouldn't be covered.

It was very good for the--what we call the raise the stakes argument, to show what's really at stake in this case.

I think also Kennedy actually was--I think he was pushing for something. He was saying, well isn't there a constitutional right to access to all government services?

I think he was maybe building on his decision in Romer here--he was saying that--where it was held that a municipality cannot strike down--cannot-- a state cannot strike down a municipality's rule protecting people against discrimination on the basis of sexual orientation, because they can't decide that one group does not have access to the government process, or it was an initiative, I guess.

So that case is a very strong case which I think was argued both in the government's brief and

in the party brief that there's a kind of general right to be included in what the government offers.

MR. HERMAN: Do we have time? Let's have one more question. Right here in front.

MS. DORIS RAY: I was wondering when I was listening to the questions and answers in the Court, as a person with a disability, I was wondering, why aren't--it seemed like they were trying--somebody was trying to open the argument to, don't you have the right to be abroad in the land?

I know that--I recall that the Lane side stepped back from that and there was all this discussion about fundamental rights versus non-fundamental rights. I was wondering about--and I think you may have answered some of that here, I'm not sure--but I'm still kind of wondering why they didn't get into that.

The second thing was that if they make a decision that says, okay Title II is constitutional when it applies to fundamental rights like voting or access to the state legislature--the state

legislature where I live isn't--that building is not accessible--not very accessible--but anyway--but what about all of the other state and local government-funded services that make a difference in our lives, especially transportation that's publically funded?

How is--how is this all going to shake out for all the local government services and all of the right to get into a school, or the right to get around on public transportation, and all the other services?

MR. BURNIM: You know, I'll be the first to answer your question. No one really knows how it will shake out. That's what we'll learn when we read the decision of the Court in Tennessee v. Lane.

You can sort of look at this case is it's about damages versus injunctive relief. But another way to look at the case--and I think it goes to your question does Congress have the authority to impose these obligations on the states, both in the area of fundamental rights and

in all these other areas--while they may not be fundamental constitutionally, they vitally affect people's existence, like transportation.

I think what our problem was is that Congress used sort of two--two of its powers, and when you look at one, it seems more appropriate for holding up--or upholding Title II's application to fundamental rights.

When you sort of look--that's the Fourteenth Amendment power, which is why there was so much discussion today of the Fourteenth Amendment and fundamental rights--when you look at the other applications of Title II to areas of non-fundamental rights, what Garrett set up is a situation where it seemed difficult to persuade the Court that the Fourteenth Amendment gave power--gave Congress the power to regulate those areas of state activity.

But then, as Tom suggested, you've got the Commerce Clause. So I think some of what we're hoping will happen here, especially if Tom's right, is that all of Title II will end up being good and

effective legislation that as a result of the decision in Lane, if it upholds the application of--if Title II is good Fourteenth Amendment law as to fundamental rights, we got all the fundamental rights covered, access to the courthouse, access to the voting process.

To those other areas like transportation, which is--clearly can be regulated within Congress' commerce power, but also the ice hockey rinks and the voting--you know, the fishing licenses and sort of right down the line, all of that will be good--good legislation because it's within Congress' commerce power.

For some of us--I mean, part of the struggle, as we were talking about, is do you offer the statute up--do you ask the Court, vote the statute up or down in its entirety, or to kind of parse it in some way?

There's pros and cons, as people have discussed. But one of the things we're hoping is that if the Court does parse it, you get in all in the end.

MS. MAYERSON: I think it would be difficult for the disability community to see any win that has to do with fundamental rights as a real win and not a huge loss. Because even though all these things are true from a legal perspective, there is some real deep symbolism, in the Fourteenth Amendment and the Equal Protection Clause.

There is some kind of blow to the status of people with disabilities and what the movement is based on to have it kind of parsed out in this very legalistic way.

So where it might have been the best we can do, I don't think that the disability community and movement could ever consider a real win, win out of a parsing out kind of approach.

MR. WOLFSON: The right to be abroad in the land I think is a wonderful point, because I think actually--you know, the Americans with Disabilities Act essentially declared the right to be abroad in the land.

I think it's a--you know, from my

perspective, it's a really good thing for the citizens of the United States and an exercise of self-government to kind of declare for themselves that there's--you know, that there is a right--that there is a right which we are bound to protect.

The kind of disheartening thing--I mean, in some way, it was, you know, maybe optimistic, and in other ways it's quite disheartening.

This is sort of, I think, exactly what Justice Kennedy was kind of struggling with, which is when he said is there a freedom of movement? I think he was struggling with just--well, isn't there some--isn't there some right just to kind of be where you--you know, to kind of move about, to be where you want to be?

You know, obviously, there are time, place and manner regulations to that. I mean, I don't have a constitutional right to be in Patty's office tomorrow at 11:30, I guess, if she doesn't invite me there.

But this is--you know, we have a right to travel, to live in any state, you know, where we

want to live. This is sort of part of the kind of basic--you know, basic freedoms that I think Americans take for granted, and that Congress in 1990 realized should apply to people with disabilities also.

The kind of--the depressing thing is, the kind of mode that we're in now in this kind of post-Boerne era is, well there's only a right to be abroad in the land if the Supreme Court has said so, or if you're willing to convince the Supreme Court there is.

Congress can't kind of make that further step. That's--so that's why I--again I said, you know, where there's good news, there's also bad news at the same time.

MR. HERMAN: I think our questionnaire has one quick follow-up.

MS. DORIS RAY: Yeah, I wanted to ask the other part that I forgot was, a lot of people with disabilities, when we were advocating for the Americans with Disabilities Act, one of the things we said was, we're paying tax dollars to states and

yet, we can't use state services.

And so where does that fit into all of this from today? We--certainly we should have the right to be abroad and to go into state government and not have somebody say you can't be here because you look a certain way, but also, we pay our taxes too and we live up to our civil obligations. What about the government's obligations?

MS. MILLETT: Amen.

MS. DORIS RAY: But could that be argued in the context of (Microphone off.).

MR. HENDERSON: I think--I think--

MS. DORIS RAY: Contracting.

MR. HENDERSON: I think voice was given to that argument rather powerfully today. But I think the problem is, as we have said before, what the Court has done is put Congress in the position of saying, you can't do--you can't declare anything unlawful, vis-a-vis the states, that we haven't already said violates the Constitution.

They have stripped Congress of the power to give meaning and interpretation, and as someone

said, to speak as a society, to say we think everybody ought to have access, everybody ought to be treated equally, everybody ought to be afforded equal opportunity.

The Court is saying no, you can't do that. In fact, the government can--is free to discriminate on any number of bases, and we're not going to let you outlaw that unless we decide that it is unconstitutional.

So in that respect, they have taken away Congress'--our ability as the people through our representatives to declare what the law should be and to hold our own state governments accountable to those standards. They've taken that away and I don't see any sign that at least a number of them would be persuaded to do anything differently.

Hopefully, there are one or two justices in the middle of the court who, like in *Hibbs*, took a different view and may be reconsidering what they've started.

MS. MILLETT: I do think--if I could just add on, I think this case forces the Court to

grapple with the doctrine in a way that it hasn't had to in prior cases.

And so, maybe this is why I keep writing these briefs. I'm not giving up yet. But maybe--maybe it will not turn out as pessimistically as is feared at least by some.

One thing I think happened at the argument today that I hope really brings that home to them, and that was, in the Garrett opinion, Justice Kennedy and O'Connor in concurrence said, like Paul was saying, we think if there's really a problem out there, there's going to be court cases finding this problem, and this sort of who has to act first for this legislation.

It happened today when the attorney from Tennessee said, look, there's--government--Justice Breyer pointed out, we have a long list of cases of unconstitutional and--unconstitutional treatment of individuals with disabilities, and he said, yes, and there's none about the inability to get into the courthouse.

I sat there thinking, exactly. How can

you hear cases about getting into the courthouse if you can't get into the courthouse. That--that's the point.

I hope that that will force them to grapple it. This is the perfect case for saying, wait, how can we insist that the courts have found this problem first?

And they sort of already started that with Hibbs, because as Paul mentioned, they couldn't do that in the gender discrimination area either because government--Congress acted first, and, you know, Title VII was out there before there was a long record--there was, you know, we all remember again from our--there was Reid v. Reid, the one rational basis with teeth for gender, before Title VII was extended to the states. It wasn't even--it was a year later, I think, before--at least a year before there was intermediate scrutiny applied by--I mean, plurality of the court.

This case, I think, will force them to grapple, you know, not just with the as-applied versus facial, but fundamental rights. And then if

you've got a fundamental rights problem, how--there's prophylaxis--how much prophylaxis can you have, what is it--you know, what does it mean?

I think--I've always thought of this case as this should be the quintessential section 5 legislation because there's a real problem out there. But it is one that sort of courts, especially in this case, have real institutional limitations on their ability to both identify and redress. We can't get into the courthouse, we can't do a lot for you to redress you as a court, your injury, as a court.

Because of those limitations, this should be the area where Congress--this should be exactly what the section 5 is designed for. Congress can address the concern. There's difficult lines here. There's difficult problems. And it's exactly what we should have a legislative process to deal with.

I've been wrong before, but my hope is that because they have to grapple this--new doctrines here, that maybe things will come out in a positive manner.

MR. HERMAN: In closing, I've just been handed a note that Mr. Brown, Bill Brown, who argued the case for Mr. Lane today, is in the back. Where--let's give him a hand. Thank you, Bill.

Thank you to our panelists, and thank you too for showing up tonight.

(Whereupon, at 7:51 p.m., the meeting was adjourned.)